

**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT**

UNITED STATES OF AMERICA

v.

JONATHAN MERINO

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File No. 1:02-CR-86-01

ORDER

The Magistrate Judge's Report and Recommendation was filed September 30, 2005. (Paper 53) After de novo review and absent objection,¹ the Report and Recommendation is AFFIRMED, APPROVED and ADOPTED. See 28 U.S.C. § 636(b)(1). Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Papers 29, 31) is DENIED. With respect to his claims regarding inadequate psychiatric care and placement, the Court construes those as brought pursuant to 28 U.S.C. § 2241, and they are dismissed without prejudice for lack of jurisdiction.

Pursuant to Fed. R. App. P. 22(b), the Court DENIES petitioner a certificate of appealability ("COA") because the petitioner failed to make a substantial showing of a denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). In addition, because the petition has been dismissed on procedural grounds, the petitioner cannot be issued a

¹ The Court notes that the Report and Recommendation was returned undeliverable as to the defendant on 11/01/2005 and no forwarding information is available. (Paper 55) The Bureau of Prisons' website indicates the defendant was released from custody on 9/30/2005. Defendant's petition is not moot simply because he was released. Defendant is challenging his sentence, and if successful, could have his sentence, including the period of supervised release, reduced. Consequently, defendant still has "a personal stake in the outcome," and the petition is not moot. See Spencer v. Kemna, 523 U.S. 1, 7 (1998); United States v. Verdin, 243 F.3d 1174, 1178-79 (9th Cir. 2001).

COA due to his failure to demonstrate that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” See Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000).

It is further certified that any appeal taken in forma pauperis from this Order would not be taken in good faith because such an appeal would be frivolous. See 28 U.S.C. § 1915(a).

SO ORDERED.

Dated at Brattleboro, in the District of Vermont, this 9th day of November, 2005.

/s/ J. Garvan Murtha

J. Garvan Murtha
United States District Judge